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Supreme Court of the United States

OCTOBER TERM, 1949

No.....

THE UNITED STATES OF AMERICA, on relation of JAMES W. MOBLEY, RELATOR, PETITIONER,

versus

GENERAL THOMAS T. HANDY, Commanding Officer, Fort Sam Houston, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and BRIEF IN SUPPORT THEREOF

TO THE SUPREME COURT OF THE UNITED STATES:

The United States on relation of James W. Mobley, Relator, Petitioner here, prays that a writ of certiorari issue to review the judgment entered in this case on the 2nd day of August, 1949, by the United States Court of Appeals for the Fifth Circuit.

OPINION

The District Court did not write an opinion.

The opinion of the Court of Appeals is not yet reported in Federal Reporter, but a copy thereof is attached hereto.

JURISDICTION

The judgment below was entered on the 2nd day of August, 1949. The jurisdiction of this Court is invoked under Sec. 1254 (1) of Title 28 of the U. S. Code entitled, "Judicial Code and Judiciary," Act approved June 28, 1948, effective September 1, 1948.

QUESTIONS PRESENTED

The exact questions presented by the opinion and the record are these:

I.

Whether, under Article of War 2 (d), the United States at all relevant times not being at war, its army in Germany had jurisdiction to cause Petitioner, a citizen, civilian and resident of and in the United States, to be arrested in Houston, Texas, and held by military personnel for the purpose of returning him to Germany to stand trial on court-martial charges under Article of War 96, based on a prior arrest, accusation and restriction of Petitioner to geographical limits of Germany: These facts appearing:

(1) Petitioner, while a civilian employee of the Frankfort Military Post Exchange, in time not of war, was arrested in Germany as a person serving with the army and charged with violation of Article of War 96 because of alleged improper use made by him of cigarette coupons;

(2) Petitioner after arrest and accusation was restricted to the geographical limits of the Frankfort Military Post;

(3) Thereafter Petitioner was discharged by the Army as a person serving with the army from his said Post Exchange employment;

(4) Still thereafter Petitioner returned to the United States, of which he was a citizen, and while a civilian and citizen and resident of the United States in Houston, Texas, he was arrested as aforesaid for return to Germany.

II.

Whether the rule that jurisdiction once attached is not lost by a mere subsequent change in the status of an accused, as applied by the lower Court to the case of Petitioner, conferred a jurisdiction which was by clear implication *denied* to the military by jurisdictional Article of War 2, paragraph (d) thereof; the facts appearing being those which are set forth under numbered paragraph I next hereinabove.

III.

Whether the effect of the discharge of Petitioner by the Army in Germany was to set Petitioner at liberty from his prior arrest and his prior restriction to local geographical limits: These facts appearing:

(1) Petitioner, a civilian employee of the Frankfort Military Post Exchange in Germany, accused of violating Article of War 96, was arrested by the Army and restricted under Article of War 69 to the geographical limits of the Frankfort Military Post.

(3) Thereafter, the Army voluntarily discharged him as a person serving with said Army from his said civilian employment.

(3) Jurisdiction under Article of War 2(d) in time not of war was given only to the Armies outside the United States, and that jurisdiction was given only over civilians, that is, persons "serving with" and persons "accompanying" the Army or Armies.

(4) The Army in Germany, before any trial and before Petitioner left Frankfort, Germany, and returned to the United States, voluntaritly discharged Petitioner as a person *serving with the Army* in Germany. Thereby, the Army put Petitioner in the class of a person *accompanying* the Army — a new and different jurisdictional class. But the Army did not newly arrest or attempt to again arrest Petitioner until Petitioner had already established his residence in the United States as a citizen and civilian.

(5) The same authority, considered in the sense of the Commanding General of the Army of Occupation in Gemany, that discharged Petitioner, also arrested and accused and restricted him to local geographical limits. Thereby, under Article of War 69, Petitioner was set at liberty by proper authority, no new arrest of him having been made in any territory outside the territorial jurisdiction of the United States.

STATUTES INVOLVED

Article of War 2(d), 10 U.S.C.A. Sec. 1473.
Article of War 69, 10 U.S.C.A. 1541.
Article of War 96, 10 U.S.C.A. Sec. 1568.

STATEMENT

On April 5, 1949, Petitioner filed his petition for a writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division (R. 7, 2-6). On May 10, 1949, said Court granted Respondent's Motion for a Summary Judgment "on the pleadings" and denied Petitioner's Petition for a Writ of Habeas Corpus and remanded him to the custody of Respondent. (R. 22-24)

Petitioner appealed from said judgment to the United States Court of Appeals for the Fifth Circuit, and on August 2, 1948, said Court entered its judgment affirming the judgment of the trial court. (R. 32-35)

Respondent filed his motion in said Court of Appeals, together with Stipulation and Agreement of Petitioner and Respondent therein, and on August 24, 1949, said Court vacated its order restraining Respondent from removing Petitioner to Germany. (Certified copy on file in this Court.) The said stipulation and agreement in effect was that Petitioner might be taken to Germany for court-martial trial, but that the question of jurisdiction here would not thereby be waived or in anywise affected by such removal to Germany. (See said certified copy.)

On July 31, 1948, Petitioner was a civilian employee with the Frankfort Military Post Exchange, United States Army, in Germany, on which date he was arrested, and shortly thereafter was charged with violation of Article of War 96 by reason of improper use of cigarette coupons. (R. 3) On November 1, 1948, the Army in Germany discharged him from his said employment. (R. 3, 4)

Prior to such employment Petitioner was a member of the United States Army in Germany, and was honorably discharged. (R. 3) After said arrest in Frankfort, Petitioner alleges he was morally restricted to the geographical limits of the Frankfort Military Post. (R. 18, 8)

Thereafter Petitioner left Frankfort and came to the United States. (R. 3, 5)

Petitioner settled in Houston, Texas, and on March 28, 1949, in Houston, Texas, was arrested by military personnel, who advised that his arrest was for the purpose of removing him to Germany for court-martial trial upon charges of violation of Article of War 96. (R. 5)

REASONS FOR GRANTING THE WRIT

Article of War 2(d) grants a different jurisdiction over civilians in time of war from the jurisdiction it gives over civilians not in time of war. The rights of civilians when this country is not at war have traditionally been committed to civil jurisdiction and this case is believed to be the first case in which a civilian not in time of war has been arrested by the military *in* the United States for removal to a territory *foreign* to the United States to stand trial for alleged violation of any Article of War.

This is believed to be the first case in which a civilian employee of a Post Exchange of the Army in a territory foreign to the United States was arrested and charged, *not in time of war*, with violation of military law, later discharged from such employment and thereafter, at a time when he was a civilian citizen, resident of and in the United States with no connection whatever with the military, nevertheless, the military jurisdiction over his person was asserted by his arrest in the United States. The decision of the Court of Appeals that such citizen is still subject to military jurisdiction over his person is a decision upon an important question of Federal law which has not been, but should be, settled by this Court, because:

(1) Article of War 2, paragraph (d), makes civilians *in time not of war* subject to military law *only* when the Army, which the civilians serve with or accompany, is in foreign territory, that is, "without" the territorial jurisdiction of the United States. This clearly means *only* a civilian who is, at the time jurisdiction is asserted, *then* accompanying or is *then* serving with the Army which is *then* in a territory foreign to the territorial jurisdiction of the United States, is subject to military law.

The previously mentioned traditional policy of this country to adjudicate civilians' right in civil courts seems

not to have been given any consideration in the decision of the Court of Appeals.

(2) The rule upon which the lower Court decided adversely to Petitioner was that: Jurisdiction over the accused having once attached by arrest, charges made and restriction to geographical limits ordered, such jurisdiction continued and was not defeated by a mere subsequent change in accused's status; that is, by a breach of arrest and subsequent flight to the United States. The rule of law so applied is logically and inevitably susceptible of interpretation that *in time not of war* the mere arrest of a civilian by the Army in foreign territory and his restriction by the military to a specified area, causes its jurisdiction to attach to his person and continue so that if and when said civilian later removes to the United States, the military may lawfully then arrest such civilian and return him to foreign territory for trial upon court-martial charges brought after he had left the foreign territory. The application of such rule by the lower court had the effect of conferring a jurisdiction which was, by the clearest implication, denied to the military by Article of War 2(d) wherein *in time not of war*, the military is given jurisdiction *over* civilians *only* "without" the said territorial jurisdiction, and only *in time of war* is the military given jurisdiction over civilians both *"within"* and *"without"* the territorial jurisdiction of the United States.

Here there was more than a mere change of Petitioner's status in his return to and residence in the United States. There was a change of jurisdiction and law. By Joint Resolution of the Congress it is enacted in substance and effect that in the interpretation of said paragraph (d) of Article of War 2 commencing July 25, 1947, the United States is not "in time of war." The territorial jurisdiction of the Army of the United States in Germany over the person of Petitioner had ended and the jurisdiction of the

civil courts of the United States had commenced and continued to the exclusion of any military jurisdiction in the Armies of the United States over the person of Petitioner. The question before the lower courts was the military's right to arrest and detain Petitioner, a civilian, within the territorial limits of the United States, for removal beyond said territorial limits.

It is most important to the civil jurisdiction of the United States and the civilian citizens thereof to have the higher Court determine whether the rule of law, impliedly laid down by the lower Court, be in conflict with Article of War 2(d) or not, and if in conflict, if such rule of law is superior to the jurisdiction granted to the military by Article of War 2(d).

WHEREFORE, Petitioner prays that his petition for a writ of certiorari from this Court to the Court of Appeals for the Fifth Circuit be granted.

And accompanying this petition, in support thereof, is Petitioner's Brief.

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BRIEF OF PETITIONER
In Support Of The
PETITION FOR WRIT OF CERTIORARI

NOW COMES Petitioner in the cause styled and numbered in the foregoing petition for writ of certiorari, and now here presents his brief in support of the said petition.

GROUNDS OF JURISDICTION

This action raises the question of jurisdiction of the United States Army over the person of Petitioner in the United States under Article of War 2 (d). The trial court granted Respondent's motion for judgment on the pleadings and denied Petitioner's application for a writ of habeas corpus (R. 23). The judgment of the trial court was affirmed by the Court of Appeals by its judgment entered August 2, 1949 (R. 35).

The jurisdiction of the Supreme Court is invoked under Sec. 1254(1) of Title 28 of the United States Code, entitled "Judicial Code and Judiciary," approved June 28, 1948, effective September 1, 1948.

OPINION

The District Court wrote no opinion.

The Court of Appeals for the Fifth Circuit wrote an opinion, a copy of which is attached hereto, and copy of which is found R. 32-35, is not yet reported.

ARGUMENT.

Facts made to appear by the pleadings are as follows:

Petitioner was honorably discharged from the United States Army in Germany (R. 3); thereafter, on July 31,

1948, while a civilian employee of the Frankfort Military Post Exchange, Frankfort, Germany, Petitioner was arrested by military personnel and was accused of having violated Article of War 96 by reason of improper use of cigarette coupons (R. 3). On August 5, 1948, Petitioner was restricted by the military in Germany to the Frankfort Military Post (R. 8, 9, 18, 19); Petitioner alleged that he was morally restricted to the Frankfort Military Post (R. 18, 8); on November 1, 1948, the United States Army in Germany discharged Petitioner from his said employment with the Frankfort Military Post Exchange in Germany (R. 3, 4). Thereafter, Petitioner left Frankfort and came to the United States (R. 3, 5); Petitioner, a citizen of the United States (R. 2), settled in Houston, Texas, and on March 28, 1949, in Houston, Texas, was arrested by military personnel, who advised that the arrest was made on instructions from Washington that he be arrested and returned to Germany to stand trial under the July, 1948 charge (R. 5).

A copy of charges of violation of Artice of War 96 was served upon Petitioner December 10, 1948 (R. 9).

Respondent filed a motion in the Court of Appeals, together with Stipulation and Agreement of Petitioner and Respondent to the effect that Petitioner might be returned to Germany for court-martial trial, but the question of jurisdiction here would not be waived thereby, or in anywise effected by such removal to Germany (see certified copy from the Court of Appeals on file with the Clerk of this Court). The Court of Appeals acting on said motion and stipulation and agreement, made its order vacating its prior order restraining Respondent from removing Petitioner until its further order. (See same certified copy.)

Petitioner contends that Congress intended that *in time not of war* the civilians described in papragraph (d)

of Article of War 2, should not be subject to military law *where presently within* the territorial limits of the states of the United States and of the District of Columbia.

Petitioner further contends that where *in time not of war*, an offense is charged to have been committed by a civilian in a foreign territory in violation of Artice of War 96, that after arrest and accusation, but before trial, if the accused returns to the United States of which he is a citizen, that he is not there subject to military law, and in consequence, is not liable to arrest in the United States for return to the foreign jurisdiction for trial by Army court-martial.

Petitioner still further contends that because he was, after arrest but before trial, voluntarily and deliberately, by proper military authorities, discharged from his employment as a civilian and thereafter was not a person serving with the Army, such discharge under such circumstances had the substance and effect of setting Petitioner at liberty from such arrest.

Petitioner will now discuss these three contentions in the order named.

Article of War 2 is the jurisdictional article. Paragraph (d) thereof relates exclusively to civilians. Said Article 2, paragraph (d) is set forth in the margin./1

1/ "Article 2. The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: * * *

(d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *" Article of War 2 (d), 10 U.S.C.A., Sec. 1473.)

It will be noticed that there are three classes of civilians in said paragraph (d) who are subject to military law:

(1) Retainers to the camp.

(2) Persons serving with the Army.

(3) Persons accompanying the Army.

It will further be noticed that in time not of war, jurisdiction over these three classes of civilians is given only to the Army which is operating in foreign territory, that is, "without the territorial jurisdiction of the United States." It is the contention of Petitioner that notwithstanding his prior arrest and accusation of violation of Article of War 96 while a civilian employee of the Frankfort Military Post Exchange, that upon his return to the United States, before any trial of Petitioner (a citizen, a civilian and then a resident of the United States) neither the military in the United States nor the military without the United States had any jurisdiction over his person whatsoever. In other words, Petitioner contends that the military in Germany, at the time of his apprehension in the United States, had no *then* jurisdiction over the person of Petitioner because he was not physically present in Germany, and the military in the United States had no jurisdiction over the person of the Petitioner, because, not being in time of war, all civilians in the United States were subject *alone* to civil jurisdiction.

Congress was careful to preserve the traditional rights of civilians to be tried by civil courts, except in time of war and when accompanying or serving with the Army beyond the territorial limits of the United States, by the Joint Resolution of Congress effective July 25, 1947, being 61 Stat. 451, Chap. 327, *Public Law* 239, Senate Joint Resolution No. 123. The solicitude of Congress there is exhibited by the fact that of the various categories of persons mentioned in Article of War 2 who are made subject to

military law, only paragraph (d) of Article of War 2, relating solely to civilians, was singled out by Congress when it declared that as to such civilians a state of war and of national emergencies should no longer be construed to exist as of July 25, 1947. The applicable portion of said Joint Resolution is given in the margin./2

Article of War 2 in part reads:

> "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles:"

Paragraphs (d) and (e) under said Article of War 2 are the only paragraphs that deal with civilians in the category of Petitioner on March 28, 1949, when he was arrested in Houston, Texas, paragraph (e) dealing with "* * * All persons under sentence adjudged by courts-martial;". Petitioner contends that in adopting Senate Joint Resolution No. 123 and making it applicable only to Paragraph (d) of Article of War 2, and not applicable to Paragraph (e) or any other paragraph of Article of War 2, Congress intended that thereafter the military should not, within the territorial limits of the United States, exercise any jurisdiction over civilians except, "All persons under sentence adjudged by courts-martial;"

Analyzing Article of War 2 (d), it is clear that Congress intended that all retainers to the camp and all per-

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2/ "* * * Sec. 3. In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941; * * * Chapter II, article 2(d), 48, 58, 59, 74, 75, 76, 77, 78, 79, 104, and 119 of the Act of June 4, 1920 (41 Stat. 759, ch. 227); * * *"

sons accompanying or serving with the Armies of the United States *without the territorial jurisdiction* of the United States should be subject to military law whether in time of war or not. It is equally clear that, except *in time of war*, all such retainers and persons accompanying and serving with the Armies of the United States should not be subject to military law unless they were *without the territorial jurisdiction* of the United States. The first part of said paragraph (d) obviously gives the military jurisdiction both in time of war and in time not of war over retainers to the camp and persons accompanying or serving with the Armies when "without the territorial jurisdiction of the United States," while the second part of said paragraph (d) beginning as it does with, "* * * * and in time of war * * *" gives the military jurisdiction over the same persons whether they be *within or without* the territorial jurisdiction of the United States. In other words, in time of peace the military have jurisdiction over such civilians when they are outside the territorial jurisdiction of the United States, and it is only *in time of war* that Congress saw fit to give the military control over such civilians both *within and without* the territorial limits of the United States.

Article of War 2 expressly provides that the persons named in the letered paragraphs "are" subject to military law; which means that those persons who presently fit any description of a persons made subject to military law by said Article of War, and none other, are subject to military law; therefore, to fit the jurisdictional description, Petitioner must have been, at the very time of his arrest in Houston, Texas, on March 28, 1949, both present in Germany or elsewhere outside the limits of the United States and serving with, a retainer to the camp, or accompanying the Army outside the United States.

Respondent seeks to justify Petitioner's arrest in Houston, Texas, upon the rule that a subsequent change in the status of an accused does not destroy a jurisdiction once attached by arrest and charges preferred. The Court of Appeals gave effect to this rule.. To the position that said rule applies here, there are three answers:

(1) Under these authorities, namely, *Wales vs. Whitney,* 114 U.S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; *Van Meter vs. Sanford,* 5 Circuit, 99 Fed. 2d 511; and *Ex Parte Ventura,* 44 Fed. Supp. 520, the restraint of Petitioner, under the facts of this record, was moral, not legal;

(2) If, however, Article of War 69 relating to arrest and restriction of an accused, has the effect to make that a legal restraint which otherwise would under said authorities constitute a moral restraint only, then, as is hereinafter more fully shown, Petitioner was, by proper authority, set at liberty from said arrest and restriction;

(3) And, finally, to give effect here to said rule, would, in substance, create a new jurisdiction in alteration and contradiction of Article of War 2 (d) and the intent of Congress manifested in said Article of War 2.

Petitioner contends that because the Army deliberately discharged him as civilian employee employed with the Frankfort Military Post Exchange, that the necessary effect of this act was to set Petitioner at liberty from the prior arrest and restriction. Remembering that Petitioner was arrested July 31, 1948, and accused of having violated Article of War 96, and that on August 5, 1948, Petitioner was restricted by the military to the geographical limits of the Frankfort Military Post, the voluntary discharge of Petitioner by the Army on November 1, 1948, as a civilian employee with said Post Exchange serving with the Army, severed him from his relation to the Army as a person serving with the Army and put him

in the jurisdictional class of a civilian accompanying the Army, if it did not in fact remove him entirely from subjection to military law. The act of discharge by the Army was not only a deliberate act, but was done before any trial had been had. *In re: Bartolo*, 50 F. Supp. 929, 932, 933, is found copied the testimony of the Judge Advocate General explaining at legislative hearings the reasons why Congress should add a third class of civilians, viz: "persons accompanying," as also subject to military law. Under Article of War 69, it is provided in effect that an arrest shall last until accused "is set at liberty by proper authority." Article of War 69 is copied in the margin./3 Using the word authority in the sense of head of the United States Army of Occupation in Germany, the same authority that hired Petitioner, also arrested, accused and restricted him to geographical limits, and later discharged him from his Post Exchange employment.

3/ Article of War 69. "Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumtances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct. (June 4, 1920, c. 227, subchapter II, Sec. 1, 41 Stat. 802) (10 U.S.C.A. Sec. 1541.)

Petitioner was arrested and accused in Germany *as a civilian serving with the Army.* As such he was restricted to specific geographical limits. Also as a civilian serving with the Army he was discharged November 1, 1948. The arrest of Petitioner as a civilian serving with the Army could last only as long as he was serving with the Army. Upon his discharge he was no longer a civlian serving with the Army; at most, he was then a person accompanying the Army, a new jurisdictional person, — therefore, his discharge, being the same proper authority which caused his arrest and brought the accusation against him, in substance and effect set Petitioner at liberty from his prior arrest and restriction. Certain it is, that if the military had desired to hold Petitioner as a civilian accompanying the Army in Germany, it could on November 1, 1948, at the very moment of discharging him from his civilian employment with the Post Exchange, have again arrested Petitioner. The effect claimed for the discharge of Petitioner is emphasized by the admitted fact that written charges were served upon Petitioner not earlier than December 10, 1948, long after his said discharge and when, at most, he was a civilian accompanying the Army.

WHEREFORE, United States of America on Relation of James W. Mobley, Relator, Petitioner herein, prays that this Court grant his petition for Writ of Certiorari from this Court to the Court of Appeals for the Fifth Circuit, and that upon consideration thereof after granting, the judgment of the said Court of Appeals affirming the judgment of the trial court, together with the judgment of the

said trial court, severally be set aside, and that this Court render judgment that the petition for Writ of Habeas Corpus be granted, or, in the alternative, that the cause be remanded for trial upon evidence to be taken.

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UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 12,853

THE UNITED STATES OF AMERICA, on relation of JAMES W. MOBLEY, RELATOR, APPELLANT,

versus

GENERAL THOMAS T. HANDY, Commanding Officer, Fort Sam Houston, Respondent, APPELLEE.

Appeal from the District Court of the United States for the Western District of Texas
San Antonio Division

(August 2, 1949)

BEFORE HUTCHESON, SIBLEY, AND WALLER, *Circuit Judges.*

PER CURIAM: Setting out frankly and with detailed particularity, the circumstances of his arrest and deten-

tion by the military, appellant, relator below, sought release on habeas corpus./1

The respondent, in his return, with equal frankness, particularity and detail, showed: that relator had been arrested as charged; that he had been restricted to the geographical limits of the Post by direction of the Commanding General; that the imposition of this restraint was made known to relator, who acknowledged it in writing, and his willingness to comply with it; that he had breached his arrest and fled to the United States; and that he had been arrested in Texas to be carried back to Germany by air for trial there by general court-martial.

To this return, relator filed a traverse and an amended traverse, in which, denying, as a legal conclusion, that anyone with lawful authority had restricted him to the geographical limits of the Frankfort Military Post and required him to appear and report each morning at 9 o'clock, he yet admitted, as a matter of fact, that he had received the letter which purported to advise him that he had been placed under arrest and so restricted, and to require him to personally report each morning to the provost marshal.

1./ He alleged that while attached to the Army as an employee of the Post Exchange at Frankfort-am-Main, Germany, he had been on 7-31-48, arrested by the United States Military authorities and confined in jail, and shortly thereafter charged with violation of Art. 96 of the Articles of War, 10 USCA, Art. 1568; that though entitled to a speedy trial, he was not tried, and, released from jail, he continued to serve as civilian employee until 11-1-48, when he was separated from his employment and discharged as such employee.

He further alleged that no trial was accorded him from 7-31-48 until about Dec. 20, 1948, when he left and came by airplane to the United States, and that having returned to the U. S., he was no longer under the jurisdiction of the military authorities or subject to rearrest or trial on the charge.

As to the court-martial charges, alleging merely that he does not have sufficient information to either admit or deny that the charges were signed and sworn to on August 27, 1948, and referred to a general court-martial for trial on December 9, 1948, with a copy of said charges served on him, he yet admits that some character of paper was served on him on or about that date.

As to the showing in the return that he was arrested pursuant to the written order of the provost marshal general, he does not deny that he was so arrested. He merely makes the legal point that the order was not a valid one because the court-martial had lost its jurisdiction after separation of relator from service with the Post Exchange in Frankfort.

The district judge, of the opinion that upon the matters pleaded and admitted, relator's detention was lawful and that he was not entitled to relief, denied the writ. Relator is here making no contention upon the facts but presenting the legal contention that at the time of his arrest in the United States, he was a civilian and was, therefore, not subject to military jurisdiction or to military arrest here, on the order of the European Command for return to Europe for trial by court-martial there.

Admitting that while he was in Germany he was, under Subd. (d) of Art. of War. 96, subject to military law and jurisdiction, he insists that because of the joint resolution of the Congress, approved and effective July 25, 1947, declaring the state of war and national emergency to no longer exist, he was not subject to military jurisdiction or military arrest except when beyond the territorial limits of the United States, and that, therefore, the military could not arrest and detain him there.

The respondent takes the short and simple position that military jurisdiction had attached to relator in Germany

and that, by escape and flight to this country, relator could not divest that jurisdiction.

We agree with the respondent. It is, of course, clear that except for offenses under Art. 94, a discharge from service ends the military jurisdiction and one may not be thereafter arrested and tried for offenses committed prior to such discharge, even though he should enter upon a new enlistment. *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210. That rule, however, is without application here. Relator was arrested and held for trial at a time when jurisdiction over him existed and his breach of arrest and subsequent flight in violation of *Art. of War* 69, Sec. 1541, Title 10 USCA could not change his status and deprive the military of the jurisdiction and authority over him already acquired. *Barrett v. Hopkins*, 7 Fed. 312; *In Re: Bird*, Federal Cases 1428; *Hironimus v. Durant*, 168 F(2) 288. *Cf. Perlstein v. United States*, 151 F(2) 167.

The order denying the writ and remanding relator to the custody of respondent was right. It is

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 430

UNITED STATES OF AMERICA, ON RELATION OF JAMES W. MOBLEY, PETITIONER

v.

GENERAL THOMAS T. HANDY, COMMANDING OFFICER, FORT SAM HOUSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 32-35) is reported at 176 F. 2d 491.

JURISDICTION

The judgment of the Court of Appeals was entered August 2, 1949 (R. 35). The petition for a writ of certiorari was filed October 28, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether court-martial jurisdiction, once obtained over a civilian employee of the United States Army in Germany, not in time of war, is lost when such civilian breaches his arrest and restriction to the Army post in Germany and returns to the United States.

STATUTES INVOLVED

Article of War 2, 10 U.S.C. (1946 ed.) 1473, Act of June 4, 1920, c. 227, subch. II, § 1, 41 Stat. 787, provides:

> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law", whenever used in these articles: * * *
>
> * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

Article of War 69, 10 U.S.C. (1946 ed.) 1541, Act of June 4, 1920, c. 227, subch. II, § 1, 41 Stat. 802, provides:

> Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

Article of War 96, 10 U.S.C. (1946 ed.) 1568, Act of June 4, 1920, c. 227, subch. II, 41 Stat. 806, provides:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial,

according to the nature and degree of the offense, and punished at the discretion of such court.

STATEMENT

In a petition for a writ of habeas corpus filed in the District Court for the Western District of Texas, petitioner alleged that after his honorable discharge from the United States Army in April 1946, he was employed as a civilian in the Army Post Exchange at Frankfort, Germany; that on or about July 31, 1948, he was arrested by the United States military authorities, confined in jail, and shortly thereafter charged with violating AW 96, *supra,* in that he used cigarette ration coupons as money while serving as such civilian employee (R. 2-3); that after his release from jail at Frankfort he continued to serve as such civilian employee until on or about November 1, 1948, when he was discharged from such employment by the military authorities (R. 3-4); that on or about December 20, 1948, he left Paris, France, by airplane and came to the United States (R. 3); that after settling in Houston, Texas, he was, on or about March 28, 1949, arrested by military police for return to Germany for trial on the charges filed in July 1948; that he was taken to Fort Sam Houston, Texas, and placed in a military prison; that his arrest in Houston was without legal authority and an attempted exercise by the United States Army of a jurisdiction which had terminated on November 1, 1948, when

he was discharged as a civilian employee of the Army in Frankfort (R. 5).

In respondent's return to an order to show cause for petitioner's restraint (R. 6), it was stated that petitioner was suspended from duty status as an employee of the Frankfort post exchange on August 2, 1948, and that on August 5, 1948, by order of the Commanding General of Frankfort Military Post, he was placed under arrest and restricted to the geographical limits of the post and was required by the terms of the restriction to report each morning to the Provost Marshal pending the outcome of court martial charges initiated against him (R. 8, 12); that petitioner was notified of this restraint on the same date and acknowledged his willingness to comply with it (R. 11); that the arrest and restriction of August 5, 1948, were imposed upon petitioner pending investigation of court-martial charges under AW 96 involving 13 specifications;[1] that the charges were signed and sworn to on August 27, 1948, the investigation under AW 70 was completed on or about November 15, 1948, and on December 9, 1948, the charges were referred to a general court-martial for trial; that on December 10, 1948, a copy of the charges was served on petitioner; that petitioner's final separa-

[1] Petitioner was charged with appropriating for his own use tobacco rationing coupons, unlawfully appropriating and selling, between April 15 and July 31, 1948, approximately 19,600 cartons of cigarettes intended for use by the United States Army, and embezzling 2,800 cartons of cigarettes entrusted to him as an employee of the post exchange (R. 9, 11-12).

tion from employment with the European Command Exchange System was not effected until after he had breached his arrest and restraint on or about December 22, 1948, by departing from the geographical limits of the Frankfort Military Post (R. 9, 12); and that petitioner was arrested in Houston, Texas, on or about March 28, 1949, by order of the Provost Marshal General of the United States Army, for return to the European Command to stand trial on the charges pending against him (R. 10, 14).

In an amended traverse, petitioner denied that on or about August 5, 1948, there was a lawful order of the Commanding General of Frankfort Military Post for his arrest; denied that there was any lawful arrest or restriction in force against him on or about December 22, 1948, and denied that he breached any arrest or restraint; admitted that on or about August 5, 1948, he was shown a letter advising him of his confinement to the Frankfort Military Post and requiring him to report personally each day to the Provost Marshal; stated that he did not have sufficient information to form a belief as to the number of specifications in the court-martial charges against him but admitted that he understood the charges were under Article of War 96 for misappropriation or misapplication of cigarette coupons and ration tickets; and stated that he did not have sufficient information to admit or deny that the court-martial charges were re-

ferred to a general court-martial for trial on December 9, 1948, with a copy of said charges being served on him, but admitted that some character of paper was served on him on or about December 10, 1948 (R. 18-20).

On the basis of the facts shown by these pleadings, the District Court denied the petition for a writ of habeas corpus, holding that the Department of the Army had authority to arrest petitioner in Frankfort, Germany, and hold him for trial by court-martial for the offenses charged under AW 96, that nothing had occurred since his arrest and restriction to divest the Department of such authority, and that the Department had authority to arrest him on March 28, 1949, and to hold him for trial by court-martial (R. 22-23). The order of the District Court was affirmed by the Court of Appeals for the Fifth Circuit (R. 35).

ARGUMENT

Petitioner does not seem to deny that he was subject to the Articles of War while he was employed by the Army in a civilian capacity at the post exchange in Frankfort, Germany. He contends, however, that since military jurisdiction in time of peace over civilians "accompanying or serving with the armies of the United States" is limited to such persons so serving "without the territorial jurisdiction of the United States" and extends to civilians serving within the United States only in time of war (AW 2(d), *supra,* p.

2), the military authorities in Germany had no jurisdiction over his person at the time of his arrest in Houston, Texas, "because he was not physically present in Germany," and the military authorities in the United States had no jurisdiction "because, not being in time of war, all civilians in the United States were subject alone to civil jurisdiction" (Pet. 12).[2] The trouble with this argument is that it ignores the fact that petitioner was subject to trial by court-martial for the offenses which he was charged with having committed while serving as a civilian employee of the Frankfort post exchange and that court-martial jurisdiction to try him for such offenses had attached before he fled. Petitioner's breach of his arrest and his flight to the United States, after the charges had been referred for trial by court-martial and served upon him, did not defeat that jurisdiction so as to preclude his arrest in the United States and return to Germany for trial.

While we have found no authorities precisely in

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[2] S. J. Res. 123, approved and effective July 25, 1947, c. 327, sec. 3, 61 Stat. 449, 451, 452, provides:

"In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941;

* * * * * *

"Chapter II, articles 2(d), 48, 58, 59, 74, 75, 76, 77, 78, 79, 104, and 119 of the Act of June 4, 1920 (41 Stat. 759, ch. 227) [the 1920 Articles of War]."

Thus, we were at peace within the meaning of Article 2(d) during the period involved in this case.

point, the case is governed by settled general principles. Petitioner's flight after referral of the charges for trial suggests the analogy of a fugitive from an indictment duly returned in a federal district court. Such a person is subject to arrest wherever he is found within the jurisdiction of the United States (Rules 4(c)(2) and 9, F. R. Crim. P.) and to summary removal to the district where the prosecution is pending merely upon production of a certified copy of the indictment and proof that the defendant is the person named therein (Rule 40(b)(3)). There are no analogous provisions in military law, but AW 69, *supra*, pp. 2-3, provides that "Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest." Obviously, this authority extends to any place where the offender may be found within territory where military authority exists and also includes authority to remove him to the place of trial.[3] A prisoner arrested pursuant to

[3] Neither are there any venue provisions in military law. *A Manual for Courts-Martial* (1928 ed.), which was in effect at the time of the proceedings in Frankfort, provided that "courts should be assembled at posts or stations where trial will be attended with the least expense and delay" (par. 36, p. 27). There is no similar provision in *Manual for Courts-Martial, U. S. Army, 1949*, effective February 1, 1949. See *Hironimus* v. *Durant*, 168 F. 2d 288 (C.A. 4), certiorari denied, 335 U. S. 818, and *Durant* v. *Hiatt*, 81 F. Supp. 948 (N. D. Ga.), where officers on terminal leave were arrested in the United States and returned to Germany for trial. In the latter case the trial began and ended in Germany but part of it was held in Washington, D. C. This action was sustained against the contention that the court-martial lost jurisdiction by reason of its moving to Washington (81 F. Supp. at 949-950, 955-956).

AW 69 cannot defeat such jurisdiction by his own act of violating the conditions of his arrest. For it is a general principle that once jurisdiction attaches, "it cannot be divested by mere subsequent change of status." *Carter* v. *McClaughry*, 183 U. S. 365, 383.

Thus, in *Barrett* v. *Hopkins*, 7 Fed. 312, 315 (C.C. D. Kansas), cited with approval in the *Carter* case, proceedings against a soldier had been "instituted while he was clearly within the jurisdiction of the military authority, by the preferring of the charges, and by his arrest, as well as by the forwarding of the charges to headquarters, with an application for the appointment of a court-martial for his trial," and the question was whether jurisdiction to try him ceased after the expiration of the term of his enlistment. In holding that it did not, the court said:

> The general rule is that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of the trial, judgment, and execution.[4]

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[4] In *Hirshberg* v. *Cooke*, 336 U. S. 210, while holding that a Navy court-martial has no jurisdiction to try an enlisted man for an offense committed during a prior enlistment terminated by an honorable discharge, even though he re-enlisted on the day following his discharge, the Court adverted to the prior Navy opinion and the prevailing Army view that courts-martial were without jurisdiction "to try their personnel for offenses committed prior to an honorable discharge *where proceedings had not been instituted before discharge*" (pp. 216-217; italics supplied).

The same provisions of AW 69 which authorized petitioner's arrest in the first instance also authorized his rearrest in Texas, after he had breached his arrest, for removal to Germany for trial on the charges pending against him. During, as well as before, his arrest, he was subject to military jurisdiction. Cf. *Carter* v. *McClaughry, supra.* Indeed, in breaching his arrest, he violated the further provision of AW 69 that "any other person subject to military law [i.e., other than an officer or cadet] who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct."[5]

Nothing in AW 2(d), upon which petitioner relies, shows that the Army authorities exceeded their powers in rearresting him for return to Germany for trial. That article simply describes the persons who are subject to the Articles of War and, as to civilians, the territorial scope of that jurisdiction in times of war and peace. Petitioner does not deny that he was subject to the articles at the time of the offenses charged against him and that jurisdiction to try him for such offenses had attached long before his flight to the United States. The fact that in March 1949, when be was re-

[5] It does not appear, however, that petitioner has been charged with this offense. The order for his arrest specified that he was to be returned to Germany for trial on the pending charges (R. 14).

arrested in Texas, we were at peace within the meaning of AW 2(d), and that civilians serving with the Army within the United States were not subject to the articles, does not defeat that jurisdiction. Petitioner cannot, by his own wrongdoing, gain the benefit of a provision which was wholly inapplicable to him at the time of his arrest.

Neither is there any merit in petitioner's contention (Pet. 15-17) that his discharge from employment with the Frankfort Post Exchange liberated him from the arrest and restraint imposed upon him in August 1948 and in some way terminated military jurisdiction to try him.[6] He does not claim that he was released from arrest and it is clear, on the contrary, that his restriction to the geographical limits of the Frankfort Military Post continued in effect (see R. 11).[7] Here again

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[6] Petitioner alleged that he was separated from this employment on November 1, 1948 (R. 3-4). It appears from respondent's return that he was not finally separated until after he had breached his restraint in December 1948 (R. 12). As will appear in the text, we think it is immaterial whether the separation occurred before or after petitioner's flight.

[7] Petitioner's contention that this restraint "was moral, not legal" (Pet. 15) and, hence, that court-martial jurisdiction did not thereby attach is frivolous, and the cases he cites to support his postulate that the restraint was only moral are wholly inapposite. Those cases (*Wales* v. *Whitney*, 114 U. S. 564; *Van Meter* v. *Sanford*, 99 F. 2d 511 (C.A. 5); *Ex Parte Ventura*, 44 F. Supp. 520 (W. D. Wash.)) merely held that habeas corpus will not lie on behalf of a person not under physical restraint. Petitioner was placed under arrest and his restriction to the geographical limits of the post was expressly authorized by the provision of AW 69 that "Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority." Furthermore, the attachment of juris-

the principle that jurisdiction once attached is not defeated by a subsequent change of status is fully applicable. There is no provision of law, so far as we are aware, which required the Army to keep paying petitioner his salary, even after his arrest for the theft of over 20,000 cartons of cigarettes, as a condition essential to the continued maintenance of jurisdiction.

In the instant case, petitioner was separated from his employment after the commission of the offenses charged against him and after court-martial jurisdiction had attached. In other situations, courts have sustained court-martial jurisdiction over civilians who had accompanied or served with the Army in foreign territory and had committed offenses after their discharge but before their return to the United States. Thus, in *Perlstein* v. *United States,* 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U. S. 777, dismissed as moot, 328 U. S. 822, a civilian employee of a contractor engaged in salvage operations in Massawa, Eritrea, as part of an Army project was ordered to be discharged and sent back to the United States at the earliest opportunity. On September 26, 1942, the day he was to board an Army ship for return to the United States, he was alleged to have stolen jewelry and forged a receipt for it. After he left Massawa the theft was discovered, he was arrested in Twefik,

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diction had advanced far beyond the stage of arrest before petitioner's flight and discharge: the charges had been investigated and referred for trial.

Egypt, tried, and convicted by court-martial. It was held that the fact of his discharge from his civilian employment prior to his offense and trial did not terminate court-martial jurisdiction over him since he was still a person "accompanying" the Army within the meaning of AW 2(d). See also *In re Di Bartolo,* 50 Supp. 929 (S.D. N.Y.); *Ex parte Gerlach,* 247 Fed. 616 (S.D. N.Y.).

Here, on the other hand, petitioner was more than a person accompanying the Army. He was actually employed by and serving with the Army in foreign territory and thus, under AW 2(d), was subject to the Articles of War; the offenses charged against him were committed while he was so employed; and he was arrested and charged with those offenses and court-martial proceedings had thus been commenced. Neither the subsequent separation from his employment nor his breach of arrest and flight to the United States destroyed the jurisdiction of the Army to rearrest him for trial on charges validly instituted.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1949.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 430

THE UNITED STATES OF AMERICA, on relation of JAMES W. MOBLEY, RELATOR, PETITIONER,

versus

GENERAL THOMAS T. HANDY, Commanding Officer, Fort Sam Houston, RESPONDENT

Petitioner's Motion For Rehearing

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versus

GENERAL THOMAS T. HANDY, Commanding Officer, Fort Sam Houston, RESPONDENT

PETITIONER'S MOTION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner in the above styled cause files this his motion for rehearing, and says:

This motion for rehearing should be granted because of the importance of the question of federal law involved which should be settled by this court, the lower court having erred in holding that jurisdiction existed in the military to arrest petitioner within the United States; because,

On the date of the arrest of petitioner within the United

States, the uncontroverted facts here controlling on the question of jurisdiction, were these, namely:

That petitioner was a civilian having no connection with the military; that he was arrested by the military in Houston, Texas, within the territorial jurisdiction of the United States, and was taken into custody and held by military authority for removal from the territorial limits of the United States to a point without the territorial jurisdiction of the United States, towit, Germany; that the United States was at peace (Article of War 2[d]); that petitioner was not a person under sentence of a court-martial (Article of War 2[e]), but had merely had charges preferred against him while he had been without the territorial limits of the United States.

On these controlling facts, the ultimate controlling question is, whether in time of peace, the military authorities have jurisdiction of arrest over a civilian not under any sentence of a court-martial while such civilian is within and not without the territorial jurisdiction of the United States?

The lower court held the military had jurisdiction to arrest petitioner in the United States. We respectfully urge that the lower court was in error in so holding, and that the question is of such importance to civilians of the United States that this court should interpose and settle the question whether in the opinion of this court the lower court were right or wrong.

WHEREFORE, petitioner prays as he has heretofore in his petition for writ of certiorari prayed.

Petitioner certifies by counsel whose name is signed and subscribed that this motion for rehearing is presented in good faith and not for delay, that the petition is restricted to the grounds hereinbefore set out.

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